

Grondorf, Field, Black & Company and Sign, Scene, Pictorial Painters, Display and Decorators, Local 831, International Brotherhood of Painters and Allied Trades, AFL-CIO

Exhibitree, Inc. and Sign, Scene, Pictorial Painters, Display and Decorators, Local 831, International Brotherhood of Painters and Allied Trades, AFL-CIO

Exhibitree, Inc. and Southern California Local 831 Employer Pension Plan

Grondorf, Field, Black & Company and Southern California Local 831 Employer Pension Plan

Grondorf, Field, Black & Company and Southern California Local 831 Health & Welfare Funds

Exhibitree, Inc. and Southern California Local 831 Health & Welfare Funds. Cases 21-CA-28302, 21-CA-28304, 21-CA-28424, 21-CA-28425, 21-CA-28426, and 21-CA-28427

August 31, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND
TRUESDALE

On May 28, 1993, Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondents and the General Counsel filed exceptions and supporting briefs, and the General Counsel filed an answering brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and con-

clusions only to the extent consistent with this Decision and Order.

1. The judge recommended dismissal of the allegation that Respondent Exhibitree, Inc. (Exhibitree) violated Section 8(a)(5) by unilaterally changing holidays and overtime wage scales when it issued "Guidelines" to employees at a September 30, 1991 meeting. At the time the document was distributed, the most recent collective-bargaining agreement had expired, and the parties had reached neither agreement on a new contract nor impasse. The Guidelines provided eight paid holidays, while terms of the parties' expired contract had provided nine. The Guidelines also contained different overtime provisions.

Several days after the September 30 meeting, Exhibitree distributed two other documents to employees. A one-page "Letter to Shop Employees" stated that some unintentional mistakes had been made in its earlier written communications about personnel policy. Another document entitled "Exhibitree Factory Employment Guidelines" was identified as a replacement for the prior Guidelines. The new version provided for nine paid holidays and altered the "work week and overtime" provision that had been set forth in the September 30 document. The judge found that the deletion of the ninth holiday from the original Guidelines was a simple inadvertence, and that changes of both holiday and overtime-formula provisions from those in the expired agreement were effectively "cured" by subsequent communications with employees. We disagree.

Passavant Memorial Area Hospital, 237 NLRB 138 (1978), sets forth the Board's standard for effective repudiation of unlawful conduct: Repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct," 237 NLRB at 138, quoting *Scott & Fetzer Co.*, 228 NLRB 1016 (1977). In addition, there must be adequate publication of the repudiation to employees involved, and the disavowal of coercive conduct should give assurances to employees that they will incur no future interference with their Section 7 rights.

In this instance, the Respondent's asserted "cure" of the original Guidelines falls short of the *Passavant* standard in several respects. The Respondent unlawfully solicited resignations of union membership immediately following the September 30 distribution before the revision. Therefore, as the judge found with respect to the unilateral changes in benefit plans contained in the same document, the revision was not issued in a context free from other proscribed conduct. Further,

¹ Respondent Grondorf, Field, Black & Company (Grondorf) filed a motion to reopen the record, and the General Counsel filed an opposition to that motion. In its motion, Grondorf argues that the record should be opened to permit it to adduce evidence concerning impasse allegedly reached by the parties in April 1992, well after the 1991 events at issue in this case. We deny the motion as lacking in merit without prejudice to Respondent Grondorf's raising this issue at the compliance stage of the proceeding.

Respondents Grondorf and Exhibitree, Inc. filed motions to strike the General Counsel's brief in support of exceptions. We deny Respondent Grondorf's motion as moot in view of the General Counsel's having filed a revised brief prior to receipt of Respondent Grondorf's motion. We deny Respondent Exhibitree's motion as lacking in merit.

² The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There were no exceptions to the judge's finding that the Respondents did not violate Sec. 8(a)(5) and (1) by failing to furnish information to the Union; to the finding that Exhibitree, Inc.'s graphics

department manager, David White, is not a statutory supervisor; or to the absence in the judge's conclusions of law, recommended Order, and notices to employees of any reference to the allegations that Grondorf violated the Act by reassigning employee Steve Kennedy and threatening his discharge.

there is no showing that the Respondent offered assurances against future Section 7 interference. In the absence of an effective repudiation, we find that the Respondent violated Section 8(a)(5) of the Act by announcing changes in holiday and overtime-formula policies.

2. The judge found that the strike commencing September 27, 1991, was an unfair labor practice strike from the outset. His remedial Order, however, does not contain the standard requirement for the Respondents to reinstate striking employees upon their unconditional offers to return to work. We find merit in the General Counsel's exception to this omission and revise the remedy accordingly.

AMENDED REMEDY

Because unfair labor practice strikers are entitled to special remedial provisions, even if there is no allegation of any denial of reinstatement, we shall order the Respondents to offer the strikers, on their unconditional applications to return to work, immediate and full reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after the onset of the strike. The Respondents shall make the strikers whole for any loss of earnings and other benefits resulting from any failure to reinstate them within 5 days of their unconditional requests, with backpay and interest to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³ Any such employees for whom employment is not immediately available shall be placed on a preferential hiring list for employment as positions become available and before other persons are hired for the work. Priority for placement on such a list shall be determined by seniority or some other nondiscriminatory test.

In its exceptions and brief, Grondorf contends that it should not be required to make the health and welfare funds whole because the employees were provided with an alternative plan. We reject that contention. "[E]mployees have, in addition to a stake in receiving benefits negotiated on their behalf by their chosen rep-

resentatives, a clear economic stake in the viability of funds to which part of their compensation is remitted." *Manhattan Eye, Ear, & Throat Hospital*, 300 NLRB 201, 201-202 (1990), enf. denied 942 F.2d 151 (2d Cir. 1991). See also *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983).⁴

Because we agree with the judge that the Respondents unlawfully and unilaterally implemented their own fringe benefit plans, and because we have adopted the judge's remedy requiring the Respondents to bargain over the implementation of the plans, we find it unnecessary to reach or provide a remedy for the judge's additional finding that the Respondents failed to bargain over the effects of these changes. We have accordingly modified the recommended Order and the notices to employees.

ORDER

The National Labor Relations Board orders that

A. Respondents Grondorf, Field, Black & Company and Exhibitree, Inc., Irvine, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully imposing conditions to a final contract offer.

(b) Unlawfully instituting company benefit plans inconsistent with bargaining obligations and without affording the Union an opportunity to bargain over these changes.

(c) Discontinuing contributions to union pension and health and welfare trust funds.

(d) Refusing to bargain collectively with the Union as the exclusive bargaining representative of the Respondents' employees.

(e) Unilaterally implementing changes in the wages, benefits, and other terms and conditions of employment of the bargaining unit employees.

(f) Failing to afford the Union an opportunity to bargain over the proposed implementation of changes in terms and conditions of employment.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

³ The Board has found that the 5-day period is a reasonable accommodation between the interests of the employees in returning to work as quickly as possible and the employer's need to effectuate that return in an orderly manner. *Drug Package Co.*, 228 NLRB 108, 113 (1977), modified on other grounds 507 F.2d 1340 (8th Cir. 1978). Accordingly, if the Respondents here ignore or reject, or have already rejected, any unconditional offer to return to work, unduly delay their response to such an offer, or attach unlawful conditions to their offers of reinstatement, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work. *Newport News Shipbuilding Co.*, 236 NLRB 1637, 1638 (1978), enf. 602 F.2d 73 (4th Cir. 1979).

⁴ Although the court denied enforcement, it did so on the facts of the case that, as the union had disclaimed interest in representing the employees, the employees no longer had a future interest in the stability of the fund.

Accordingly we adopt the judge's requirement that, inter alia, the Respondents make the benefit funds and the employees whole for losses stemming from the Respondents' failure to make fund payments. To the extent that an employee has made contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the respondent otherwise owes the fund.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All journeymen exhibit builders, apprentices, and helpers employed at the Respondents' Irvine, California facilities, excluding all clerical, office, professional, confidential, supervisory employees and guards as defined under the Act.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Make all contributions to the union pension and health and welfare funds that have not been paid since October 1, 1990, and that would have been paid but for the Respondents' unlawful discontinuance of the payments, and make whole unit employees for any losses resulting from the failure to pay employer contributions to these funds in the manner set forth in the remedy section of the judge's decision.

(d) Post at their facilities in Irvine, California, copies of the attached notice marked "Appendices A and B," respectively.⁵ Copies of the notices, on forms provided by the Regional Director for Region 21, after being signed by the Respondents' authorized representatives, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

B. Respondent Grondorf, Field, Black & Company, Irvine, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employees about union support or union activities.

(b) Discharging employees because they engage in a strike.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Steve Kennedy immediate and full reinstatement to his former job, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of earnings

and other benefits suffered as the result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(b) Remove from its files any reference to his unlawful discharge and notify him in writing that this has been done and that the discharge will not be used against him in any way.

C. Respondent Exhibitree, Irvine, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Renouncing and bypassing the Union as collective-bargaining representative of its employees.

(b) Soliciting and inducing employees to resign their membership in the Union and requiring such resignation as a condition of returning to work from a strike.

(c) Unilaterally changing holidays and overtime wage scales of employees without affording the Union an opportunity to bargain over these changes.

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with Sign, Scene, Pictorial Painters, Display and Decorators, Local 831, International Brotherhood of Painters and Allied Trades, AFL-CIO as the exclusive bargaining representative of our employees, in the following appropriate bargaining unit:

All journeymen exhibit builders, apprentices, and helpers employed at our Irvine California facility, excluding all clerical, office, professional, confidential, supervisory employees and guards as defined under the Act.

WE WILL NOT impose unlawful conditions to any final contract offer made to the Union.

WE WILL NOT unlawfully institute company benefit plans inconsistent with bargaining obligations and without affording the Union an opportunity to bargain over these changes.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT unilaterally implement changes in the wages, benefits, and other terms and conditions of employment of the bargaining unit employees.

WE WILL NOT fail to afford the Union an opportunity to bargain over the proposed implementation of changes in terms and conditions of employment.

WE WILL NOT coercively interrogate employees concerning their union sentiments.

WE WILL NOT discharge employees because they engage in a strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights you by Section 7 of the Act.

WE WILL offer Steve Kennedy immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL retroactively resume contributions to the Union's pension and health and welfare funds and make employees whole for losses incurred because we discontinued the contributions.

WE WILL, from the date of the strike, reinstate on request all striking employees to their former jobs or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after the start of the strike, and make the employees whole, with interest, for any loss of earnings or other benefits resulting from any failure to reinstate them on unconditional request.

WE WILL, on request, bargain with the Union as the exclusive representative of all employees in the appropriate unit, described above, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement.

GRONDORF, FIELD, BLACK & COMPANY

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with Sign, Scene, Pictorial Painters, Display and Decorators, Local 831, International Brotherhood of Painters and Allied Trades, AFL-CIO as the exclusive bargaining representative of our employees, in the following appropriate bargaining unit:

All journeymen exhibit builders, apprentices, and helpers employed at our Irvine California facility, excluding all clerical, office, professional, confidential, supervisory employees and guards as defined under the Act.

WE WILL NOT impose unlawful conditions to any final contract offer made to the Union.

WE WILL NOT unilaterally implement changes in the wages, benefits, and other terms and conditions of employment of the bargaining unit employees.

WE WILL NOT fail to afford the Union an opportunity to bargain over the proposed implementation of changes in terms and conditions of employment.

WE WILL NOT renounce and bypass the Union as collective-bargaining representative of our employees.

WE WILL NOT solicit and induce our employees to resign their membership in the Union, and require such a resignation as a condition of returning to work from a strike.

WE WILL NOT unilaterally change holidays and overtime wage scales of employees without affording the Union an opportunity to bargain over these changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL retroactively resume contributions to the Union's pension and health and welfare funds and make employees whole for losses incurred because we discontinued the contributions.

WE WILL, from the date of the strike, reinstate on request all striking employees to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after the start of the strike, and make the employees whole, with interest, for any loss of earnings or other benefits resulting from any failure to reinstate them on unconditional request.

WE WILL, on request, bargain with the Union as the exclusive representative of all employees in the appropriate unit, described above, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement.

EXHIBITREE, INC.

Jean C. Libby, for the General Counsel.

A. Patrick Nagel, of Newport Beach, California, for the Respondents.

Anthony R. Segall (Rothner, Segall & Bahan), of Pasadena, California, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. These cases were tried on 7 days during the period June 2–12, 1992. Charges and amended charges were filed by Sign, Scene, Pictorial Painters, Display and Decorators, Local 831, International Brotherhood of Painters and Allied Trades, AFL–CIO (the Union), and by union benefit entities on various dates during the period October 2–December 16, 1991, and a consolidated complaint was issued January 31, 1992. The consolidated case has a variety of issues, primarily those of whether Grondorf, Field, Black & Company (GFB) and Exhibitree, Inc. (Exhibitree) each unlawfully conditioned bargaining proposals, failed and refused to provide the Union with requested information assertedly necessary and relevant to the bargaining process, unilaterally instituted benefit plans inconsistent with what survived the bargaining process, and further unilaterally discontinued previous health and welfare and pension fund contributions, these and other acts allegedly being in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

On the entire record, including my observation of the demeanor of witnesses, and after consideration of briefs filed by the General Counsel and Respondents, I make the following

FINDINGS OF FACT

I. JURISDICTION

GFB and Exhibitree are each corporations, with an office and place of business in Irvine, California, where they engage in designing and manufacturing custom one-of-a-kind tradeshow exhibits, commercial showrooms, architectural woodworking, and storage of itinerant exhibits. In the conduct of such business operations they each annually provide services valued in excess of \$50,000 for enterprises within the State of California, each of which in turn annually purchases and receives goods valued in excess of \$50,000 directly from points outside California. On these admitted facts I find that GFB and Exhibitree are each an employer within the meaning of Section 2(2), (6), and (7) of the Act and, as is also admitted, that the Union is a labor organization within the meaning of Section 2(5).

II. ALLEGED UNFAIR LABOR PRACTICES

A. Case Summary

During the summer of 1991, each Respondent bargained coordinately with the Union for a renewal contract. When agreement was not reached, a strike was authorized at each facility. Separate strikes were established against each Respondent, the one at GFB becoming immediately ineffectual and the one at Exhibitree having impact for only about 2 business days. Each Respondent then instituted changes in prior terms and the conditions of employment, mainly with respect to substituting private company plans for the Union's pension and medical insurance benefits. There were related actions to be detailed below which give rise to other issues of the case.

B. Case Facts

1. Course of bargaining

The last collective-bargaining agreement between these parties was a 3-year duration, expiring August 16, 1991. By letter dated June 20, 1991, Union Business Manager Grant Mitchell invited coordinated bargaining. A reply by Employer-Attorney A. Patrick Nagel advised that Respondents would participate in the bargaining process as a consortium.¹ The parties met for negotiations on August 1, 8, 14, 15, 28, and September 11, during which time the principal issues in dispute were revealed as wage rates, pension, health and welfare, seniority, and overtime. Attorney Nagel, chief negotiator for the Respondents in consortium, then transmitted a detailed final offer by the Employers.² As to pension it reiterated the Employers' early offer to freeze contribution amounts, while as to health and welfare it offered a small contribution increase to the union plan coupled with an earlier demand that monthly employer costs be capped at \$300 per employee. Attorney Nagel's letter, dated September 18, read in part as follows:

If this final offer is rejected or is not accepted before September 26, 1991, the implementation of the economic items of the final offer is not guaranteed to current employees or new hires by any of the three employers for any specific period of time but only for as long as each of said employers in its judgment feels that the continuation of said economic items is warranted and justified based on the economy and the competitive climate of the exhibit building industry.

Additionally, if this final offer is rejected or is not accepted before September 26, 1991, each of the three employers reserves the right to withdraw its final offer to the Union in whole or in part. In other words if the Union, so long as it retains its legal status as collective-bargaining agent, notifies any of the three employers of intent to negotiate the terms and conditions of a new collective-bargaining agreement, the employers as well as the Union shall be free to propose any terms they

¹ All dates and named months hereafter are 1991 unless otherwise indicated.

² A third company had originally been included in the bargaining consortium. There is no necessity of describing other facts of its participation.

choose and not be bound by previous agreements or proposals.

This cover letter also stated that, notwithstanding contents of the attached final offer itself, rejection of the final offer would lead to certain implementations including existing company plans covering both pension and medical insurance. At approximately this same time, the Union canceled a day-to-day contract extension which had existed between the parties by giving a necessary 7-day notice.

Mitchell did not actually focus on Attorney Nagel's letter for a few business days after its receipt. When he did so on about September 24, Mitchell immediately wrote to Attorney Nagel requesting complete information on the company medical plan to which bargaining unit employees might potentially be switched. He also scheduled a strike vote meeting for the evening of September 25.

2. The strikes

Many of Respondents' employees attended this strike vote meeting along with some interested members of the local at large. Mitchell conveyed the gist of Attorney Nagel's September 18 letter, and on this basis strikes were authorized at each employer by overwhelming vote of the respective bargaining units. In the course of this meeting the subject of crossing a picket line arose, and Mitchell addressed this by saying that members who would so engage could be fined a significant money amount for the breach of solidarity.

The strikes officially began on the morning of September 26. That was also the date of a letter from Attorney Nagel to Mitchell, advising that each employer had expressed "their respective plans" for medical insurance to the Union the day before.

3. Poststrike events

On September 26, most employees at GFB disregarded their strike vote and appeared for work essentially as usual. The Union did maintain a picket line at GFB, visited sporadically by business agents, but in practical terms the strike at that Respondent was in name only. GFB made available to employees that first morning a seven-page document, which in its view summarized bargaining differences with the Union at that point. It also set forth a detailed policy in various areas of employment, including "medical insurance" and an optionally available 401(k) plan associated to pension needs. No other poststrike activities are notable as to GFB, except for (1) later formally noticing discontinuance of contributions to both the Union's pension and its health and welfare funds, and (2) a separate play out of events concerning employee Steve Kennedy to be detailed below.

The situation at Exhibitree, located a 3 to 4-minute drive distant, was radically different. There, all bargaining unit employees honored the strike as begun on September 26, and management determined to simply hunker down for a short time while events unfolded. The hierarchy at Exhibitree was John Schumacher, president and majority joint owner, Fred Townsend, executive vice president and part owner, along with Courtney McMillan, manager of manufacturing. Other key personnel, although both being union members and within the bargaining unit, were Shop Foreman Robert (Bob) Miguelena and Graphics Department Manager David White.

By early Friday, September 27, the top management determined to invite striking employees into a meeting at 7 a.m. on Monday, September 30. It was also expected that some applicants for employment would be present at such a time, in response to help wanted advertising that had run previously. Townsend and McMillan assumed the task of contacting approximately 30 employees on strike, and did so by telephone that day and throughout Saturday, September 28. White, one of the individuals called by McMillan, testified that this official also authorized him to similarly invite three other employees of the graphics department to the Monday meeting. It is known that White did so at least as to Silk Screener and Graphics Coordinator John Pankratz, by leaving an appropriate message on that employee's answering machine.

Several striking employees managed to enter Exhibitree's facility on Saturday, September 28 and collectively speak with McMillan. This discussion touched on hypothetical matters of crossing a picket line, including related possibility of employees being fined for doing so unless they had withdrawn from union membership. Another subject of interest as discussed related to pension entitlements after the negotiations breakdown.

More importantly Schumacher had created two documents and left them for followup action by McMillan on Saturday in anticipation of Monday's group meeting. Schumacher first created a one-page "Open Letter to New Factory Employees." This was prepared for distribution in the name of McMillan, and as addressed to a "new employee" read as follows in its opening passages:

EXHIBITREE has a new and unique program for you. In particular, we are offering many things that most Exhibit Building companies do not have available.

Firstly, Exhibitree is now an "OPEN SHOP" in that we are not requiring or demanding that any factory worker be affiliated with any particular collective bargaining organization. This frees you from dues, and the periodic hassle of negotiating through "agents" to represent you.

Secondly, we offer a number of benefits that improve your life:

The one-page open letter continued with a short description of both a "health plan" and "retirement plan," along with reference to a confirming agreement "which sets down the rules for employment in our factory." Final paragraphs were pleasantly devoted to amenities that would exist while "working for the best company in the exhibit industry."

Additionally, Schumacher had generated a multipage document headed "Guidelines," which was a composite of his own accumulated computer data and tracked by sequence and subject matter the expired collective-bargaining agreement. A preliminary statement expressed that this document was "the sole understanding between the parties," meaning the employees (termed "Builders") and the employer. It closed with a final page that contemplated respective acknowledging signatures by the parties to these Guidelines.

The arranged meeting occurred as scheduled early on the morning of Monday, September 30. About 25 persons appeared for it, approximately 18 of whom were current employees of Exhibitree on strike. Officials Schumacher, Town-

send, and McMillan were present, and the order of speaking as best reconstructed from divergent testimony was McMillan with innocuous opening remarks, Schumacher to expound for the assembled group on the Open Letter and Guidelines (which had been distributed or were available to those in attendance), and McMillan again as the meeting wound down after Schumacher had departed.

Schumacher generally expressed that bargaining negotiations had not yielded a renewal contract with the Union, and for this reason the enterprise had structured its own terms and conditions for employees, both those to start as newly hired temporaries and such of those on strike as might wish to return. He also, however, repeatedly stated that he was bound by his company's final offer to the Union.

When Schumacher left the area, and with time approaching approximately 7:30 a.m., the subject of fines by the Union for crossing a picket line arose quite emphatically. A concern among the group was also heightened by Miguelena's description of what union representatives with whom he had spoken avowed would result against members who crossed the picket line to resume work. By then McMillan was the only key management figure still present, and this question of such great concern was funnelled directly to him by the indecisive striking employees in attendance. At that point McMillan offered to produce a form that would suffice as emancipating protection from union fines. He went to his own office while the group, for the most part, simply awaited his return. McMillan prepared a petition-style document dated September 30, permitting a sequence of signatures as resignations from membership in the Union effective 7 a.m. that date. It was promptly signed by 12 persons, including Miguelena and White, following which each signatory resumed work within the facility. In subsequent days of that week another six persons signed a comparable document, as made available to those so interested through Miguelena. McMillan immediately sent all the resignation actions to the Union by fax and mail transmission.

The extensive return of strikers, augmented by temporary replacement hiring, converted Exhibitree to a large measure of normal operations. The "hectic activity," however, which in its management's view had resulted from the strike, caused issuance of new documents to the work force during that initial full week.

The first of these was a "Letter to Shop Employees," dated October 3 and signed by the three key company officials. This one-page document stated that some unintentional mistakes had been made in communicating about personnel policies, but that controllingly Exhibitree was operating "as a non-union company" based on rejection on its final offer by the Union and that economic items of employment were implemented. A listing of these items, made under language stating they had been contained in the final offer, included the Company's health insurance plan as previously covering nonbargaining unit employees and a company profit-sharing plan.

A second document also issued at the time, identified at its outset as one intended to replace the Guidelines disseminated at the Monday morning meeting. This version was in format, and less so in content, more closely resembling the prior collective-bargaining agreement as to the 10 subjects covered. It was specifically corrective in restoring the ninth holiday, and largely reaffirming of the "Work Week and

Overtime (Pay)" provisions last offered. It did, however, expressly confirm that provisions of both the Company's "Health, Dental and Prescription Plan" and its "Profit Sharing Trust (in lieu of Pension Plan)" were to apply at the workplace.

By letters dated October 17, Attorney Nagel formally notified the trust fund offices for both pension and health programs that, in the absence of a renewal contract with the Union, all benefits contributions were discontinued after September.

4. Steve Kennedy

Discrete issues of the case apply to this person, and cover a time line that straddles the bargaining and poststrike phases. Kennedy is experienced and familiar to others in the industry from many years of involvement. After his long-term employer went out of business, he was hired in May as a journeyman exhibit builder by GFB in its main shop or fabrication department.

The hierarchy then at GFB was Mike Field, a co-owner and its corporate secretary, partnered in running the Company with Herb Grondorf, another part owner. The production manager at GFB was Ned Smith, assisted by Don Holder as the shop foreman. In the creation of major exhibits an industry practice exists whereby leadership in coordination and construction is assigned to one person. The practice is called a "turnover," and often starts with a meeting that includes sales, design, and specialty people whose job knowledge assist the newly appointed project leader in accomplishing the turnover. Early in Kennedy's spring-summer 1991 employment, he had received a turnover on three jobs of relatively small scope.

Paragraph 19 of the complaint separately alleges that in August GFB had committed unlawful interrogation "concerning . . . union sentiments." As to this subject, Kennedy testified that at a time during August, Field had asked him to step outside the building for conversation. They did so with Field opening the discussion by asking Kennedy how he would feel if the Company "went non-Union." After Kennedy answered inclusively, Field talked for another 10-15 minutes about the Company's fairness, and its superior medical and retirement programs as compared to the Union's.

Field fixed this outdoor conversation as August 17 to 20, but testified contrarily that after describing the unpromising progress of negotiations to that point Kennedy had no useful responses and the discussion seemed futile to continue. Field, however, ended his testimony by asserting that Kennedy volunteered were he an employer in such circumstances he "would be a non-union" one. Field also recalled discussion of what he stated was GFB's better health and welfare coverage, but did not recall the subject of pension arising.

The more extensive happenings that concerned Kennedy began around early September, when he was assigned the turnover of a job called Pace Setter for Siemens. Kennedy moved into the leader role after a turnover by having a 4 to 6-hour planning meeting with company colleagues, and then working off and on for about the equivalent of a full workweek. On the morning of September 26, Kennedy went on strike routinely, and in the process entered the facility to pack up his tools. In this activity his attention was drawn to a document being read by others, and upon inquiry he was told by Field that it represented the contract currently appli-

cable at GFB. This was in fact the earlier described summary of differences with the Union and "hourly employee policy." Kennedy reviewed it for a short while, and then not willing to abide such new terms of employment completed his gathering up and commenced to picket.

On the morning of Wednesday, October 2, he telephoned Smith to ask for current information from the Company's standpoint. When Smith said work was proceeding but help was needed, Kennedy had a change of mind and felt he should return to further assist with needed completion of the Pace Setter job. When he told Smith of these revised sentiments, he was invited to start back the next day and did so.

On his first day of Thursday, October 3, after briefly striking, Kennedy's immediate assignment as given by Holder was to assist others in a job to be shipped that weekend. He did so for the balance of that week, including the Saturday. Kennedy testified that soon after arrival at work the morning of October 7, Smith asked him into an office for a discussion. He quotes Smith as stating that the Company was "having a bit of a hard time turning work over to employees who had walked the picket line," and that the Siemens' job was to be turned over again to someone else. Kennedy simply answered meekly, and upon leaving the discussion was again given an unrelated assignment by Holder. At noon Kennedy then asked Smith for a private conversation. When the two were composed in an available conference room, Kennedy stated to Smith that he had really come back from the strike to complete the Pace Setter job as he felt was his responsibility. Smith asked if this intimated leaving again, and when Kennedy affirmed this intention he recalled Smith adding that it is regrettable for people to do things that "cost them their job" as a proverbial shooting in the foot. Kennedy testified to responding that he felt there was no choice and he left the premises at that point.

Smith's version of these discussions on October 7, essentially differs only in one important respect. He denies making any remarks referring to company displeasure over Kennedy having gone on strike, but otherwise rather closely agrees with the balance of what was exchanged on the two occasions that morning. In fact another turnover meeting occurred with one of GFB's journeymen exhibit builders, and the Pace Setter job was eventually completed after about another 6 weeks of work.

C. Issues

1. Respondents jointly

As equally applicable to Respondents in their unified bargaining role, the issues as framed by the complaint are (1) whether an unlawful condition was imposed on a final contract offer, (2) whether a resulting strike was in the nature of protesting unfair labor practices, (3) whether an impermissible failure and refusal to furnish information occurred, (4) whether an opportunity for the Union to bargain over effects of discontinuing benefit plans had unlawfully not been afforded, (5) whether that discontinuance was done unlawfully, and (6) whether they impermissibly instituted benefit plans inconsistent with their bargaining obligations.

2. As to GFB

The several additional issues relating to GFB alone are whether it; (1) engaged in unlawful interrogation of Steve

Kennedy; (2) unlawfully discharged or constructively discharged Kennedy after altering his terms and conditions of employment because he participated in the strike; (3) unilaterally instituted health and welfare and pension plans contrary to terms and conditions of employment that survived a contract expiration, and whether Ned Smith is a supervisor within the meaning of Section 2(11) of the Act.

3. As to Exhibitree

The assorted issues that also apply to Exhibitree alone are whether it (1) renounced and bypassed the Union, (2) unilaterally changed holiday and overtime provisions contrary to terms and conditions of employment that survived a contract expiration, (3) required employees to resign their union membership as a condition of returning to work from strike, after soliciting and inducing them to do so, and whether David White is a supervisor within the meaning of Section 2(11) of the Act.

D. Credibility

In the order of their testimony, I make the following credibility evaluation of witnesses.

1. Grant Mitchell was generally favorable in impression, warranting routine crediting on the basis of demeanor.

2. John Pankratz was given to near constant lapses into assumption and vaguely believed impression of facts. He was openly hesitant and lacking self-assurance in his own renditions. He exhibited a poor overall demeanor and is not a reliable source for the factual elements of episodes and remarks that he personally experienced. I extend extremely limited acceptance to his testimony, bordering on fully discrediting it for lack of an apparently effective capacity for recall.

3. David White showed a generally unfavorable demeanor, subject to occasional instances of seemingly valid recall. In general he did not give a strong impression of intending to present true facts, and made no effective explanation of major conflict between his testimony and an investigatory affidavit. I discredit White except where findings are specifically attributed to his testimony.

4. Steve Kennedy displayed a highly positive demeanor which was far and away superior to all other witnesses in the case. I am convinced that he has superb powers of observation and retentive capacity, believing from this that his testimony is unconditionally entitled to full credence. My appraisal is also affected by Kennedy's further high caliber ability to retain consistency in the elements of his testimony, regardless of how repeatedly or obliquely he was questioned. Overall, I consider him an extraordinarily believable witness.

5. Ned Smith was palpably uncomfortable in his witnessing role, and seemed to give desperately contrived or convenient answers in large part. He was suspiciously hesitant and unnecessarily ducked numerous questions to the point that I doubt every salient aspect of his testimony and emphatically discredit him in full.

6. Courtney McMillan exhibited a demeanor which strongly suggested his testimony was little more than a contrived attempt to rescue his employer from the consequences of its action. He appeared devious, evasive, and nervously parried numerous responses to legitimate questions. In most salient regards I discredit McMillan's testimony.

7. John (Jack) Prokop showed an average to good demeanor with seeming candor and no apparent reason to slant his testimony. He was, however, involved singlemindedly at critical points of his case experiences, and thus not attentive enough to generate great value in the recall process. I credit him to a moderate extent, and specifically so as to his denial that McMillan ever verbalized how employees must sign resignations from the Union in order to return for work from their strike.

8. Donald Baumgarten was very hesitant, uncertain, and suggestible, with a general demeanor so poor that I disregard his testimony as unreliable.

9. Erik Doest was seemingly intending to be truthful, and exhibited a better ability than most witnesses here to segregate fact from perception. His demeanor seemed quite earnest, and on this general basis I accord him routine credibility.

10. Mark Brown exhibited very poor demeanor, seeming quite uncertain and self-contradictory. Although called as a witness by Respondent, I am so rejective of his testimony that I disregard an otherwise damaging intimation of McMillan having stating on September 30, that employees must sign a document to return to work.

11. Robert (Bob) Miguelena testified with two seeming standards of approach; (1) being positive and complete under direct examination: and (2) the other being circuitous, hesitant, and evasive on cross. He had a conceded bias in favor of his employer, and aside from standard connective testimony I am persuaded to generally discredit him because of poor demeanor.

12. John Schumacher testified with such a degree of institutional self-interest that it was difficult to separate fact from impression in what he described. He did candidly admit to errors in his role as a labor relations activist in this course of bargaining, but overall I accord limited credence to what he told except where specifically affirmed.

13. Richard (Butch) Leff testified favorably as to minor points in the case, and to the extent the facts need be more understood I credit him routinely.

E. Discussion

1. Concerning both Respondents

I believe the bargaining process here was tainted from the outset by an employer-side intention to dictate rather than negotiate contract terms. The key to resolution of chief issues is that Respondent simply never offered the Union what it dearly wanted to institute as supplanting benefit plans for represented employees. The presentation of Respondents' case in this litigation, particularly as done from the standpoint of upper management witnesses, emphasized repeated and animated discussion at the bargaining table about respective worth of company benefit plans versus those of the Union in existence from the past. What is not shown, however, is that these alternate plans were ever offered as a true and ordinary matter of contract bargaining, and this is the essential frailty in Respondents' case.

One need only to read the plain terms of the final offer as summarized on September 18, to see that the benefit plans were still even then couched in terms of what the expired contract had provided. The fact that Attorney Nagel's cover letter advised that company benefit plans would be imple-

mented in the event of membership rejection did not magically convert this to a bona fide and previous offer to the Union, let alone provide any opportunity for direct dialogue necessary when a concrete proposal is on the table during negotiations. In *Herman Bros., Inc.*, 307 NLRB 724 (1992), the Board noted that when new bargaining circumstances exist, that is "all the more reason that further discussions with the Union might prove fruitful." I thus conclude, in agreement with the General Counsel, that without the prerequisite of an authentic subject matter offer about which a reasonable opportunity to bargain resulted, a valid unilateral change could not be made as was done here. It is noted that the case does not, therefore, involve principles of implementation after impasse, as that concept was neither present nor is it contended to be so by the parties.

Respondents' legal authorities are not persuasive toward any other view of the case. *Taylor-Winfield Corp.*, 225 NLRB 457 (1976), is not in my opinion close to being "square in point" as Respondents contend. It is a case decided instead on principles that unilateral postimpasse changes may "not exceed what was offered to, or rejected by the Union." As Respondents correctly quote, *Western Publishing Co.*, 269 NLRB 355 (1984), contained language referring to an employer's unilateral changes which "reasonably encompassed . . . pre-impasse proposals." The case also held that action must be "consistent" with such proposals, and on this basis the stopping of payments to three benefit funds by the Respondent there was permissibly implementing the same proposal it had offered to that Union before impasse. In *Brady-Stannard Motor Co.*, 273 NLRB 1434 (1985), the Board held that after impasse an employer was free to implement terms and conditions "reasonably comprehended" within its final offer. That case involved an intricate comparison between bases of establishing wage rates, with a two-member panel majority believing it was reasonable to exonerate that employer when intervening experience showed that labor cost was approximately the same regardless of which compensation formula had been used. *Brady-Stannard* was enforced at 776 F.2d 23 (2d Cir. 1985), by a divided court. I consider the *Brady-Stannard* case for what it is, however the divided Board decision, the fact that the Board has itself never again cited *Brady-Stannard*, and the appealingly instructive dissent of Judge Kaufman in the court's enforcement opinion leaves it doubtful that much weight should be extended here in a legal analysis. A basic principle on the point is found in *NLRB v. Katz*, 369 U.S. 736 (1962), where source of the rule at issue is simply and mandatorily stated as that of finding unlawfulness where a unilateral action disparate from what was offered in negotiations is a per se violation of Section 8(a)(5). The point has been more recently illustrated in *Lehigh Portland Cement Co.*, 286 NLRB 1366 (1987), in which the Board found a violation where the employer withdrew from bargaining and implemented new proposals without further discussion that were "radically different from its former proposals" I believe this is a more reasonable basis on which to key analysis of what happened here, because Respondents' implementation of their own benefit plans after concluding negotiations based on those of the Union is obviously a "radically different" posture to assume in the guise of legitimate collective bargaining.

I find that the General Counsel has clearly supported the allegation of unlawfully imposing conditions on contract proposals and, relatedly, unilaterally implementing benefit plans without affording the Union an opportunity to bargain about such plans. The extensively different company plans were neither “reasonably comprehended” within Respondent’s earlier proposal on the subject, nor were they consistent with Respondents’ “last true offer” as embodied in the final prestrike summation dated September 18. See *Fire Fighters*, 304 NLRB 401 (1991).

The nature of these strikes were shaped by circumstances faced by the Union when it assembled bargaining unit members for their meeting of September 25. The confusing, seemingly conditional, and unlawfully alternative choice that was demanded by Respondents created a mixed situation of members voting on the probable merits of what they were offered and in response to an impermissible employer tactic. There is no reason to discount the element of protest that would be involved as these bargaining units performed a referendum on the results of their Union having engaged in nearly 2 months of bargaining. An unfair labor practice character strike is found when a sufficient causal connection exists between unlawful action by an employer and the decision to strike. This sufficiency is present here. See *Decker Coal Co.*, 301 NLRB 729 (1991), and cases cited therein. It is elementary that the burden of wrongdoing must fall on the perpetrator, and from these total circumstances I conclude that strikes against both Respondents were unfair labor practice ones from the outset with the associated right of the unfair labor practice strikers attaching to all who participated in such collective withholding of services. *Henry Miller Spring Co.*, 273 NLRB 472 (1984).

I elect to recommend dismissal of the allegations regarding an unlawful refusal to furnish information to the Union. The rapidly unfolding events of late September made it essential that information as to company benefit plans be disclosed quickly. Attorney Nagel’s letter of September 18, while extensive in length and inappropriate to the bargaining process in content, did at least prominently identify as among clearly listed “economic” items a company health plan and a pension plan of “its own.” While the routine press of business delayed Mitchell’s formal written request for information until September 24, this loss of critical time was not a fault of Respondents. Evidence is lacking that Mitchell later broadened his request, or that Attorney Nagel had “stalled in responding” to the Union’s overall desire for benefit plan information. See *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992). Furthermore, the prompt forwarding by September 26 of plan brochures and insurance carrier identification, while done complainingly, did constitute a reasonable opening response. I believe this sufficed under the circumstances, and for such reason do not find that an unlawful failure and refusal to furnish relevantly necessary information occurred within the meaning of doctrine on this subject. Cf. *D. J. Electrical Contracting*, 303 NLRB 820 (1991).

The issue of whether the Union was afforded opportunity to bargain over effects of the change to company-based benefit plans is, again, determined by assessing Respondents’ overall strategy. Respondents devoted little effort to a true negotiating process; more instead to scripting a desired outcome as to the economics of employee costs into the near future, whether this be by contract with the Union or not.

The slight amount of time measured from Respondents’ final offer to an understandably scheduled strike vote simply did not provide any prospects of meaningfully tranquil “effects” bargaining. I note here that Mitchell credibly testified how an insincere seeming offer by Attorney Nagel to meet again on September 20 was not accepted because Respondents were intending to remain totally intransigent on their implementation plans. Cf. *Constructive Sheet Metal*, 283 NLRB 1069 (1987).

The discontinuance of trust fund contributions by Respondents in October was an inseparable part of their unlawful bargaining objectives. A specific remedy shall be provided below; however, the discontinuance itself also constitutes a separate unfair labor practice within the scope of complaint paragraph 14(a). See *Schuener Construction Co.*, 258 NLRB 1275 (1981); *M. J. Santulli Mail Services*, 281 NLRB 1288 (1986), and cases cited therein; and *Bottom Line Enterprises*, 302 NLRB 373 (1991).

2. Respondent GFB

The allegation of unlawful interrogation pertaining to this Respondent turns largely on credibility assessments made above. Both participants, Field and Kennedy, agreed generally on overall context of the episode. It occurred during a midpoint in contract negotiations, was initiated by top official Field, and was heightened by directing the employee to a place where private, unheard discussion could take place.

Beyond this, the versions of what was actually said digress. I am fully persuaded to accept Kennedy’s testimony that Field asked him directly about any feeling toward continuing in a nonunion employment setting. This is actually what the probability of such a staging would have brought about, and in any event what I find to be the real happenings. GFB had no legitimate basis to single Kennedy out for this uncomfortable questioning, and I conclude that it represented impermissible coercion of an employee as to their Section 7 rights. The test of *Rossmore House*, 269 NLRB 1176 (1984), bears out this conclusion. Kennedy was known to Field as a longtime industry hand, and there was even a faint hint of admiration in how Field termed his intentions for picking Kennedy to question. This does not, however, make them casual acquaintances within a workplace. Kennedy had been on the job a mere 4 months, in addition to which he had not developed any identification as an open supporter of the Union. These factors, coupled with the rather clandestine ritual of bringing Kennedy outside the facility, provide the totality of circumstances which warrants finding a violation of the Act in this regard. Cf. *Structural Composites Industries*, 304 NLRB 729 (1991).

The more complex issue concerning Kennedy is that of his cessation of employment on October 7, the events leading up to it, and reasoning as to what the cessation represented as between an employee’s voluntary action compared to involuntary dictates of an employer. I first of all fill out an emphatic crediting of Kennedy by express findings on two points. The first is that when he telephoned to Smith on October 2, his remarks actually included that he had mentally reflected about the Pace Setter turnover, and he was on the verge of dropping away as a striker because of wanting to participate as planned in its completion. Secondly, I find that on October 7, Smith said, as asserted by Kennedy, that a second

turnover of the job would happen because of Kennedy having originally become a picketer.

These two specific findings are then related to other evidence concerning this issue. An immediate point is that GFB's position is weak and confused insofar as who decided the takeaway turnover, how urgent the Siemens job was at the point of early October, and why it ultimately required the extended length of time to complete when Kennedy was allegedly "struggling" with his responsibility as the first turnover-appointed leader.

The key happenings occurred at the second meeting between Smith and Kennedy on the morning of October 7. Complaint paragraph 18(a)(ii) expressly alleges alternative theories of discharge and constructive discharge, necessitating a finding of whether Kennedy's employment was involuntarily or voluntarily ended. The credited verbalizing upon which such a finding rests is made from Kennedy's accepted testimony. Sequentially he sought out Smith to say that a few hours of reflection as he worked that morning left him feeling no compunction about leaving the struck workplace. Smith broke into the explanation to surmise whether Kennedy would be "going back out again," and the employee affirmed this intention. Smith's responding comment included both a "cost(ing)" of one's job and that Kennedy would not be coming back to work because of his repeated action of walking out.

In terms of employment basics Kennedy did not express any intention of just quitting. Even Smith's discredited testimony, while using the word "quit" as a choice of terms, coupled this with an understanding that Kennedy was merely planning to "join the picket line again." If the issue to be considered is whether a person has been constructively discharged, the fact situation must include the element of a superficially voluntary forced resignation. To the extent a voluntary forced resignation has the sound of a contradiction in terms, this may be so. It is so, however, because an employer's imposition of onerously unacceptable burdens creates the anomaly. *American Licorice Co.*, 299 NLRB 145 (1990).

As the Smith-Kennedy conversation ended that morning the employee had filled out his timecard for one-half day of work, and as plainly as possible stated he would resume the strike with which he had such basic sympathy in principle. He had not expressed anything more final than this, leaving his status as a resumed striker subject to future return as a matter of right. On the other hand Smith's remarks must be construed as a declaration that considered Kennedy terminated without any association to his rights as a striker. The words of "cost(ing)" one a job, and not again returning to a workplace are too powerful to have any meaning but that a discharge has been declared. This then becomes my finding as to Kennedy's status as he left GFB's premises following his second conversation with Smith and their closing amenities.

From this finding the issue remains whether such action was unlawful. Here, I believe Kennedy having participated in the strike was a motivating factor in his being discharged. In the first place Smith said so, and beyond that factors of timing, disparate treatment, and pretextual employer defenses would support a showing of discrimination as alleged by the General Counsel. The action took place on the first day the Siemens job was effectively scheduled to resume, and only the fourth day of Kennedy's return from striking to what was

essentially temporary emergency work of a fill-in basis. He was handily experienced in early phases of what the complicated Pace Setter exhibit would require, and aside from one isolated instance before GFB had not switched turnover leaders in the past.

The circumstances also serve to defeat GFB's burden of showing that even in the absence of protected activities it would have nonetheless also terminated Kennedy in the manner as done. The Siemens Pace Setter job was already delayed because of the strike, and I discredit testimony about Kennedy having difficulty in fulfilling his role of the coordinating leader as started during September. Finally, I find as alleged by the General Counsel that GFB denied Kennedy the work he normally would have performed, and threatened him with discharge for returning to the picket line, both in order to discourage his membership in a labor organization. The turnover leader work was career enhancing in nature, and a favorable assignment to target for retaliatory action by this employer. Smith's not too subtle threat of discharge plainly related only to Kennedy's considered plans for returning to the picket line in support of his union. On this basis the allegations of complaint paragraph 18, in association with paragraph 24, establish that Section 8(a)(3) has been violated in the manner claimed.

Complaint paragraph 17(a) contains the several allegations accusing GFB of unilaterally instituting inconsistent terms and conditions of employment, and of doing so even though contrary terms and conditions had survived a contract expiration. The conduct was tangibly contained in the summary of bargaining differences and GFB's multipage employee policy statement, as these documents became available to hourly personnel even on the first morning of the strike. I consider this allegation, and the specific conduct which it concerns, a direct and necessary link between the erroneous bargaining position taken by both consortium-joined enterprises and their ultimate discontinuance of union benefit plans. As such it shall be subject to the same conclusion of unlawfulness and recommended remedial action.

The pleadings leave in issue a matter of whether Smith is a statutory supervisor. It is plain from the proofs, however, that he occupies a management position with extensive authority in most functional areas that serve to resolve such an issue under Section 2(11) of the Act. There was no real attempt to support GFB's denial of such status respecting Smith, and his role in the Kennedy matter plus his own guileless testimony that he is "in total charge of production" leaves no doubt on the point. I hold him to be a statutory supervisor as alleged.

3. Respondent Exhibitree

Complaint paragraph 15(a)(i) is the track for words of the pleading in paragraph 17 as applying to GFB. It is thus the same theoretical category, and the subject I view as the link between more dramatic imposition of an impermissible bargaining condition and an ultimate discontinuance of trust fund contributions under union benefit plans. As with the similar issue pertaining to GFB, that of unilateral implementation while contrary terms and conditions survived a contract expiration, I find it is simply within a continuum of conduct by these employers. Such then is my comparable resolution, leaving the situation as that of both Respondents

being found equally and similarly in violation of the Act on the particular phrasings of complaint paragraphs 15 and 17.

There is next a sharp departure from some of the parallels present in this case, in that Exhibitree is solely and directly accused of renouncing and bypassing the Union in its dealings with employees. I believe both verbs apply to the events occurring on the morning of September 30 at Exhibitree's premises. The situation was concededly rife with haste and error on the part of Exhibitree, but what does emerge is a determined intention to convert the workplace from its prior unionized status to one of only direct employer-employee dealings. While I discredit Pankratz' testimony that he heard it said that morning how persons wishing to start work must sign the individual agreements, the larger circumstances readily show that the Union was treated as though never existing and the employees were spoken to as though the nonunion character of the employer should be taken for granted. The fact that Exhibitree may not have intended the open letter to reach the hands of striking employees, and that the Guidelines were not for applicants, does not alter the appearances presented. Neither is it availing for Exhibitree to point to Schumacher's (and McMillan on his behalf) repeated comments that they were still bound by a final offer to the Union, for these comments are sterile and meaningless under the more significant conduct showing just the opposite. I hold from these established proofs that the General Counsel has adequately supported allegations of the Union being unlawfully renounced and bypassed. See *Hecks, Inc.*, 293 NLRB 1111 (1989).

As to allegations involving Exhibitree of unlawfully changing holiday and overtime provisions, I do not see sufficient merits in this regard from the evidence. The deletion of a ninth holiday from Schumacher's original multisource Guidelines document was a simple inadvertence, and promptly corrected with accompanying assurances of restored accuracy. Comparably with the subject of overtime, but more intricate because of the several breakdowns this involved in terms of time span, weekends, and special nature of work performed, it was nevertheless also effectively cured to resemble what had been last existing as an offer under the contract. I, therefore, propose to dismiss this allegation of the complaint on the basis that a strict view of the facts is unwise.

On the subject of persons resigning from the Union before returning to employment, this deals with both the alleged solicitation and inducement to do so, and the alleged requirement that it be done as a prerequisite to resuming work. I believe both factors are established from the proofs. The concern for risking union fines was a permeating one, as well known to at least McMillan by the morning of September 30. The assembled group of persons, an awkward body of strikers invited into the facility while several of their fellow members continued picketing, and applicants present in nervous huddling while the peculiar moments unfolded, left Exhibitree's actions as constructively soliciting and inducing resignation from the unionists. Further, McMillan's departure from the meeting to generate the union resignation form was not preceded by any invitation to start work, a fact that enmeshes the Employer in all that concerned the subject that morning. I hold that allegations of unlawful insistence, solicitation, and inducement have been adequately proven by the

General Counsel. See *American Linen Supply Co.*, 297 NLRB 137 (1989); *Winer Motors*, 265 NLRB 1457 (1982).

As regarding Exhibitree, a disputed issue concerning White results from the denial that he is a statutory supervisor as alleged. In its brief Exhibitree terms the point "a non-issue," however, I believe a holding should be made. White supervised a small department of only three to four others, and performed rank-and-file work about 30 percent of the time. Testimony as to his role in recommending the hiring of persons is extremely shifting and inconclusive, both by White and by McMillan who attempted to cover the point. Further, there is no showing that White had instrumental authority in any of the other functional areas showing a true supervisor. Overall, while some special status attached to White by title and other secondary indicators, I do not believe he exercised any amount of independent judgment and discretion as based in Section 2(11) of the Act. I accordingly hold that he is not a statutory supervisor.

CONCLUSIONS OF LAW

1. Grondorf, Field, Black & Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Exhibitree, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Sign, Scene, Pictorial Painters, Display and Decorators, Local 831, International Brotherhood of Painters and Allied Trades, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

4. The following employees of GFB constitute a unit appropriate for purposes collective bargaining within the meaning of Section 9(b) of the Act:

All journeymen exhibit builders, apprentices and helpers employed at its Irvine, California facility, excluding all clerical, office, professional, confidential, supervisory employees and guards as defined under the Act.

5. The following employees of Exhibitree constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All journeymen exhibit builders, apprentices and helpers employed at its Irvine, California facility, excluding all clerical, office, professional, confidential, supervisory employees and guards as defined under the Act.

6. By unlawfully imposing conditions to a final contract offer Respondents violated Section 8(a)(5) of the Act.

7. The authorized strikes commenced by the Union on September 26 were in part to protest unfair labor practices by Respondents.

8. By impermissibly instituting company benefit plans inconsistent with their bargaining obligations, and without affording the Union an opportunity to bargain over the effects, Respondents violated Section 8(a)(5) of the Act.

9. By discontinuing contributions to union pension and health and welfare trust funds, Respondents violated Section 8(a)(5) of the Act.

10. By coercively interrogating an employee concerning his union sentiments Respondent GFB violated Section 8(a)(1) of the Act.

11. By discharging Steve Kennedy because he participated in a strike, Respondent GFB violated Section 8(a)(3) of the Act.

12. By bypassing and renouncing the Union, Respondent Exhibitree violated Section 8(a)(1) of the Act.

13. By soliciting and inducing employees to resign their membership in the Union, and requiring such a resignation as a condition to returning to work from a strike, Respondent Exhibitree violated Section 8(a)(1) of the Act.

14. The General Counsel has failed to prove with a preponderance of evidence that Respondents, or either of them, violated the Act other than as concluded above.

REMEDY

Having concluded that Respondents unlawfully engaged in unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action. Specifically, I shall also order Respondent GFB to offer Steve Kennedy full and immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of wages or other rights and benefits he may have suffered as the result of the discrimination against him in accordance with the formula prescribed in *F. W. Woolworth*, 90 NLRB 289 (1950), with interest as provided for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall further order Respondent GFB to remove from its records any reference to Kennedy's unlawful discharge, and notify

him in writing that this has been done and that such information will not be used against him in any way.

Having found that Respondents violated Section 8(a)(5) of the Act by ceasing to make contributions on behalf of its bargaining unit employees to the various funds, I shall order Respondents resume to making the required contributions to the respective funds and to transmit to the appropriate funds the contributions they failed to make from the period of their unlawful cessation of payments. *Merryweather Optical Co.*, 240 NLRB 1213 (1979). In addition, I shall order Respondents to make the employees whole by reimbursing them for any expenses ensuing from the Respondents' unlawful failure to make the required benefit fund contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Interest on all such sums shall be paid in the manner prescribed in *New Horizons for the Retarded*, supra.³

[Recommended Order omitted from publication.]

³ Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. I leave to the compliance stage the question whether Respondent must pay any additional amounts to the funds in order to satisfy this "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, when there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds held, additional administrative costs, etc, but not collateral losses.